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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. BURTON ROY METZGER and DARRICK OMAR HERNANDEZ, Defendants and Appellants.	2d Crim. No. B198096 (Super. Ct. No. 1192456) (Santa Barbara County)

Burton Roy Metzger and Darrick Omar Hernandez appeal from judgments entered after they were convicted by separate juries in a unitary trial. Fifteen year old Hernandez was convicted of the first degree premeditated murder of his mother (Pen. Code, §§ 187, subd. (a), 189)[1] with special findings that he personally inflicted great bodily injury on the victim and personally used a deadly weapon. (§§ 1203.075; 12022, subd. (b)(1).) Metzger was convicted of second degree murder (§§ 187, subd. (a), 189) as an aider and abettor. He was also an accessory after the fact. (§ 32.) The trial court sentenced Hernandez to 25 years to life, plus one year on the weapon enhancement. Metzger was sentenced to 15 years to life state prison.

[1] All statutory references are to the Penal Code unless otherwise stated.

We affirm the judgment as to Hernandez. With respect to Metzger, we vacate the accessory conviction because liability as an accessory is subsumed in the conviction for aiding and abetting. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 536-537; *People v. Francis* (1982) 129 Cal.App.3d 241, 251-253.) We conclude that Metzger's conviction for second degree murder as an aider and abettor is supported by substantial evidence and affirm the judgment as modified. Metzger's sentence remains the same.

Facts

In December 2005, Hernandez visited his mother, Tina Kegler, while on Christmas break. Hernandez, a ninth grader, lived with his grandmother in Goleta. Kegler was living in Lompoc with her 43 year old boyfriend, Burton Metzger.

Friends observed Hernandez curse Kegler on several occasions. Kegler told Sabrina Vines that "My son is going to kill me." When Vines asked about Hernandez at a New Year's Eve Party, Kegler brushed off the question.

The next day, Kegler and Metzger repeatedly argued about a clogged toilet. Hernandez intervened brandishing a baseball bat. A visitor, Aaron Culley, heard Hernandez and Kegler arguing for an hour. Hernandez asked if Culley would be surprised if he stabbed his mother. Culley thought he was joking and left.

At some point during the on again, off again argument, Hernandez asked Metzger, "Do you mind if I kill my mother?" Metzger replied, "Sure, go ahead." Hernandez picked up a kitchen knife and stabbed Kegler in the back. Kegler shouted, "Ouch! Why did you hit me?" Hernandez followed Kegler to the bedroom where Metzger was laying down. Kegler fell to her knees as Hernandez continued stabbing her. Metzger got up off of the bed and went to the living room. Kegler was stabbed or slashed 44 times but still alive.

Hernandez stopped, sat down next to Metzger in the living room for 15 minutes, and returned to the bedroom with the knife. Kegler looked up and said, "I'm so sorry." Hernandez pulled her up by the face and cut her throat, slashing the jugular vein

and carotid artery. Hernandez told the police that it was a fatal "home run" blow because Kegler was gurgling blood.

Hernandez told Metzger "I did it." After Metzger confirmed Kegler was dead, he helped Hernandez dispose of the body. Wrapping the body in a sheet, they rolled it out in a wheelbarrow and put the body in a car trunk.

As Metzger and Hernandez were getting ready to dispose of the body, the doorbell rang. It was 10:00 p.m. and two teenage girls had stopped by to visit. Hernandez asked the girls to wait in the TV room while Hernandez and Metzger ran an errand.

Metzger and Hernandez drove to Harris Grade near Jalama in the rain. Grabbing Kegler's legs and arms, they swung the body back and forth and threw it down the hillside.

They returned 45 minutes later. Metzger entered the house first, rolled his eyes and said "What a night," and went to bed.
Hernandez watched a movie with the girls but they left 30 minutes into the movie.

The next day, January 2, 2006, Metzger and Hernandez cleaned the house, burnt the bed sheets, and packed Kegler's clothes and purse. Metzger drove Hernandez to Goleta and dropped him off at his grandmother's. On they way, they threw Kegler's purse and belongings in a dumpster.

On January 3, 2006, Michael Stankewicz stopped by Metzger's house to drop off Kegler's younger son, Dylan. Metzger said that Kegler had left on foot and "she's not back yet." Metzger suggested that he "call the police or something," and shut the door. Minutes after Stankewicz made the missing person call, Kegler's purse was found in the dumpster. A motorist found Kegler's body later that day.

Metzger reported to work and told his supervisor that he had to go to DMV and the dump. Metzger was stopped by the police outside his house. He said that he was taking the day off to clean up.

Hernandez was arrested at school and waived his *Miranda* rights. (*Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].) After 15 minutes of questioning, he

said "All right, all right. I killed her." When asked if he was bothered about killing his mother, Hernandez said he "wasn't happy but I wasn't sad." Hernandez said that Kegler was always yelling and after "fifteen years of pure fucking hell," "something snapped."

At trial, Hernandez defended on the theory that it was a heat of passion killing provoked by long term parental abuse. Metzger claimed that he was drunk and asleep when Kegler was killed.

Voluntary Manslaughter

Hernandez argues that the trial court erred in not instructing on voluntary manslaughter based on a heat of passion killing. The trial court correctly ruled there was no evidence of objective provocation for a voluntary manslaughter instruction.

In order to reduce murder to voluntary manslaughter, provocation and heat of passion must be affirmatively shown. (§ 192, subd. (a); *People v. Manriquez* (2005) 37 Cal.4th 547, 584.) "The heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively. . . . '[The] heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances,' because 'no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused . . . .' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1252.)

Hernandez argues it was a heat of passion killing ignited by long term parental abuse. The argument fails because there was no evidence that Kegler abused or threatened Hernandez the day of the killing or that the parental abuse would have provoked an ordinarily reasonable person to kill. "The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citations.]" (*People v. Lee* (1999) 20 Cal.4th 47, 59.)

Hernandez watched a horror movie with Aaron Culley, heard Metzger and Kegler arguing, and asked Culley, "Would you be surprised if I killed my mother?" Culley said that Hernandez "looked like he was serious, but he didn't sound like it."

After Culley left, Hernandez asked for, and received permission from Metzger to kill Kegler. He stabbed Kegler from behind more than 40 times. Hernandez told the police that Kegler was "laying in the bed, bleeding, [and] I talked to her a little bit. . . ." There was no evidence that he was enraged or that Kegler did something to objectively provoke the stabbing.[2] Voluntary manslaughter requires evidence of objective provocation "[sufficient], as a matter of law to arouse feeling of homicidal rage or passion in an ordinarily reasonable person.' [Citation.]" (*People v. Pride* (1992) 3 Cal.4th 195, 250.)

Assuming arguendo that Hernandez was provoked, a substantial amount of time elapsed for an ordinarily reasonable person to cool off and regain his or her judgment. (*People v. Kanawyer* (2003) 113 Cal.App.4th 1233, 1244.) Hernandez left Kegler on the bed, told Metzger that Kegler was bleeding, and cut Kegler's throat 15 minutes later. There was no substantial evidence worthy of the jury's consideration to instruct on voluntary manslaughter. (See e.g., *People v. Gray* (2005) 37 Cal.4th 168, 219-220; *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524.)

Assuming, arguendo, that the trial court erred in not instructing on voluntary manslaughter as a lesser offense, the error was harmless. (*People v. Breverman* (1998) 19 Cal.4th 142, 178.) The evidence was overwhelming and established a willful, premeditated and deliberate murder with malice. After inflicting 44 knife wounds, Hernandez took a 15 minute break to reflect and delivered what he called the "home run" blow.

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[2] The investigating officer was under the impression that Hernandez had a fight with Kegler. Hernandez corrected the officer and said, "Aah, I didn't have a fight with her, they [Metzger and Kegler] were having a fight, that's what I'm saying. . . ."

The jury was instructed on first and second degree murder (CALCRIM 521) and that provocation may reduce a murder from first degree to second degree. (CALCRIM 522.) In convicting Hernandez of first degree murder, the jury found that it was a willful, premeditated, deliberate, and malicious killing without provocation. Had the trial court instructed on voluntary manslaughter, it is not reasonably probable Hernandez would have obtained a more favorable verdict. (*See e.g., People v. Manriquez, supra,* 37 Cal.4th at p. 586.)

Expert Opinion: Passage of Time

Hernandez argues that the trial court erred in excluding expert testimony on whether the passage of time affects one's mental state to kill. When Hernandez asked a child psychologist, Doctor Rahn Minagawa, how the passage of time may affect one's mental state, the trial court sustained a foundation objection.[3] Hernandez abandoned the question and moved on to another area. The trial court did not err in sustaining the objection. (Evid. Code, § 801, subd (b); see e.g., *People v. Coddington* (2000) 23 Cal.4th 529, 582; *People v. Boyette* (2002) 29 Cal.4th 381, 449.)

Cumulative Bad Character Evidence

Evidence was received that Kegler was a bad parent, abused drugs and alcohol, suffered mental problems, and was argumentative. Hernandez complains that the trial court erred in sustaining relevancy objections about Kegler's bad character and

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[3] Doctor Minagawa agreed that a teenager could "snap" after prolonged neglect and that "any number of things can happen when a person snaps and acts out. They can overreact, they can shut down completely, they can try and hurt themselves, they certainly can hurt others; there are a wide variety of reactions that can occur."

Defense counsel asked: "And, hypothetically, if an adolescent boy who is overwhelmed or in a highly-emotional state acted out and attacked his mother, if there are a number of nonfatal wounds, a time delay before a lethal wound, would the passing of time tend to indicate that the feelings of being overwhelmed that we're talking about has or has not subsided?"

The trial court sustained a foundation objection.

Hernandez's problems with Kegler. The trial court stated: "You have gotten a lot of evidence in at this point, some of it over the prosecutor's objection, on the parenting issues, the drug-use issues, the alcohol issues."

Hernandez asserts that he could not establish a heat of passion voluntary manslaughter defense unless the jury heard it all, i.e., long term parental abuse which he characterizes as "fifteen years of pure fucking hell." Hernandez cites 22 instances where the prosecution objected to questions about Kegler's background, drug abuse, and relationship with Hernandez.[4] Some of the questions were about incidents dating back five or ten years.

The trial court found that the evidence was not probative of objective provocation and excluded the evidence without prejudice to Hernandez's right to lay a foundation. Defense counsel was asked to explain the relevance of the evidence and to "walk me through the evidentiary link."

A trial court has broad authority to exclude evidence where its probative value is substantially outweighed by the probability that its admission will necessitate an undue consumption of time, confuse the issues, or mislead the jury. (Evid. Code, § 352; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) Kegler's intemperate lifestyle and parental abuse was explored extensively by defense counsel. The trial court did not err in excluding cumulative evidence "that merely makes the victim of a crime look bad.' [Citation.]" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496.) Revenge does not qualify as a heat of passion, voluntary manslaughter defense. (*People v. Fenebock* (1996) 46 Cal.App.4th 1688, 1704.)

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[4] The list includes evidence that Kegler had prescription medication in her purse, that Kegler had a prior assault conviction for knifing a friend when Hernandez was 12 years old, that Michael Stankewicz, a former boyfriend, told Kegler "I wish you were dead," that Kegler was using drugs before her second son Dylan was born, that police responded to a domestic violence call at Stankewicz's house in 2002, and that Kegler neglected Hernandez when he was three or four years old,

Due Process

Hernandez's due process arguments are equally without merit. The application of ordinary rules of evidence to exclude cumulative evidence does not infringe on a defendant's right to present a defense. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) Hernandez makes no showing that the trial court's rulings resulted in "the complete exclusion of evidence intended to establish [his] defense . . . ." (*People v. Cunningham* (2001) 25 Cal.4th 926, 999.)

In *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, the defendant stabbed his wife during a domestic dispute and was convicted of first degree murder. The trial court excluded evidence of the victim's violent propensity including threats the victim made. The trial court also excluded testimony about defendant's appearance and demeanor immediately before and after the murder. (*Id*., at p. 925.) A federal court granted habeas relief on the ground that the combined effect of the evidentiary rulings violated defendant's due process right to a fair trial. (*Id*., at p. 934.) The court determined the errors were not harmless because the prosecution's case on premeditation "was less than overwhelming . . . ." (*Ibid.*)

Unlike *Parle v. Rummels, supra,* a vast amount of evidence was received about Kegler's bad parenting, drug abuse and mental problems, and intemperate lifestyle. Hernandez testified that he suffered emotional problems and was fed up with the Kegler's arguing and yelling. The evidence illustrated appellant's depressed mental state and unhappy family life but did not show objective provocation to stab the victim 45 times. (See e.g., *People v. Steele, supra,* 27 Cal.4th at p. 1253.) The alleged error in excluding cumulative evidence of Kegler's bad character was harmless. (*People v. Cunningham, supra,* 25 Cal.4th at p. 999.)

Voluntary Manslaughter Based On Intoxication or Mental Defect

Appellant argues that the trial court erred in not instructing on voluntary manslaughter based on the theory that a mental disorder combined with voluntary intoxication negates malice. We reject the argument because intoxication and/or mental

defect is not compatible with the reasonable person standard for voluntary manslaughter. (*People v. Lucas* (1997) 55 Cal.App.4th 721, 739-740.) Hernandez is attempting to invoke a diminished capacity defense that was abolished by the Legislature in 1981. (§ 28; *People v. Spurlin* (1984) 156 Cal.App.3d 119, 127-128.)

In *People v. Saille* (1991) 54 Cal.3d 1103, our Supreme Court concluded that voluntary intoxication and/or mental disorder does not negate malice and reduce murder to voluntary manslaughter. (*Id*., at pp. 1112-1114.) The court held that legislation abolishing the diminished capacity defense does not permit "[a] reduction of what would otherwise be murder to nonstatutory voluntary manslaughter due to voluntary intoxication and/or mental disorder." (*Id*., at p. 1107.)

Our Supreme Court has emphasized that the Legislature has "*abolished* the defense of diminished capacity" and that "[o]nly diminished actuality survives, i.e., the jury may generally consider evidence of voluntary intoxication or mental condition in deciding whether defendant actually had the required mental states for the crime. . . ." (*People v. Steele*, *supra,* 27 Cal.4th 1230, 1253, citing *People v. Saille*, *supra,* 54 Cal.3d at p. 1116].) The cases cited by Hernandez (*People v. Blakely* (2000) 23 Cal.4th 82 and *People v. Lasko* (2000) 23 Cal.4th 101), which discuss the law of imperfect self defense, do not hold that voluntary intoxication and/or mental disorder make a premeditated murder less criminal.

Unconsciousness

Equally without merit is the argument that the trial court erred in not instructing on involuntary manslaughter based on unconsciousness. Unless the involuntary intoxication results in unconsciousness, there is no duty to instruct on involuntary manslaughter. (*People v. Turk* (2008) 164 Cal.App.4th 1361, 1378-1381.) Unconsciousness exists " ' "where the subject physically acts in fact but is not, at the time, conscious of acting." ' [Citations.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 424,) Hernandez cites no evidence, other than his voluntary intoxication, from which the jury

could have concluded that he was too intoxicated to understand what he was doing. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 418-419.)

Doctor Minagawa, a defense expert, acknowledged that Hernandez was drinking but that all the witnesses reported that "it didn't seem to [a]ffect him." Although drugs and alcohol may have clouded Hernandez's judgment, he was clearly able to entertain visitors and carry out a death threat twice repeated. The evidence, viewed in the light most favorable to the defense, shows that the alcohol and drugs consumed by Hernandez resulted in a level of intoxication far short of the grossly intoxicated state required for an involuntary manslaughter instruction. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 424; *People v. Abilez* (2007) 41 Cal.4th 472, 516.)

Metzger: Aiding and Abetting

Metzger was convicted of second degree murder as an aider and abettor (count 1; § 31) and as an accessory after the fact (count 2; § 32) .[5] We requested briefing on whether the accessory conviction is subsumed in the conviction for aiding and abetting. (See *People v. Nguyen, supra*, 21 Cal.App.4th at pp. 536-537; *People v. Francis*, *supra,* 129 Cal.App.3d at pp. 251-253.)

"There often will be an evidentiary overlap in the proof that would establish aiding and abetting and the proof that would establish being an accessory. . . . But while there may be an evidentiary overlap, the elements of the two types of criminal responsibility are separate and distinct. [Citation.] Being an accessory is not a lesser included offense within aiding and abetting. [Citation.] In fact, there is no lesser included offense within aiding and abetting, since any criminal responsibility in the commission of the crime is sufficient for conviction as a principal. [Citation.] . . . [¶] A person who is in some manner involved in a crime and/or its aftermath may be guilty of the crime as an aider and abettor or of the distinct offense of being an accessory, but in order for the defendant to be found guilty of either, all of the elements applicable to one

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[5] The trial court sentenced Metzger to 15 years to life on the aiding and abetting count and stayed imposition of sentence on the accessory count.

or the other must coalesce at an appropriate time." (*People v. Nguyen, supra*, 21 Cal.App.4th at pp. 536-537.)

As we shall explain, the evidence of aiding and abetting elements were established before Hernandez delivered the "home run" blow to the victim's throat. Metzger's actions in disposing of the body and the victim's belongings are subsumed within his guilt for aiding and abetting the murder. (*People v. Francis, supra,* 129 Cal.App.3d at pp. 251-253.) These post murder actions have evidentiary significance and could be relied upon by the people to show appellant's intent before the murder.[6]

Metzger argues that the evidence does not support his conviction as aider and abettor because he was in a drunken stupor and asleep. Aider and abettor liability is vicarious "in the sense that the aider and abettor is liable for another's actions as well as that person's own actions. When a person 'chooses to become a part of the criminal activity of another, [he] says in essence, 'your acts are my acts . . . .' [Citation.]" (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118.) Whether Metzger aided and abetted the murder is a question of fact, and on appeal all conflicts in the evidence and reasonable inferences must be resolved in favor of the judgment. (*People v. Holt* (1997) 15 Cal.4th 619, 668.)

Metzger claims that he was not an aider and abettor unless he intended to kill, i.e., he shared Hernandez's murderous intent. *People v. Mendoza* (1998) 18 Cal.4th 1114 holds that the mental state necessary for conviction as an aider and abettor is different from the mental state necessary for conviction as the actual perpetrator. "The actual perpetrator must have whatever mental state is required for each crime charged, here . . . murder. An aider and abettor, on the other hand, must 'act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission, of the offense.' [Citation.] The

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[6] We point out the obvious. Had Metzger immediately called the police, asked for an ambulance, and explained the he only thought Hernandez was kidding, such evidence would have a tendency in reason to support his contention that he did not aid and abet Hernandez.

jury must find 'the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense . . . .' [Citations.]" (*Id.*, at p. 1123.)

Aider and abettor's intent to encourage or facilitate a murder may be established by circumstantial evidence. Relevant factors include Metzger's presence at the crime scene, his failure to prevent the murder, and his words and conduct before and after the murder.[7] (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.)

Metzger was aware of the volatile mother-son relationship before he started the argument with Kegler. Their argument went on for some period of time. When Hernandez intervened with the baseball bat, Metzger left the room and allowed Hernandez to continue the argument. Aaron Culley stated that Hernandez argued with Kegler for more than an hour.

After Culley left, Hernandez asked, "Do you mind if I kill my mother?" Metzger replied, "Sure, go ahead." Metzger may or may not have thought this was a joke. This was a question for the jury. It impliedly found that Metzger did not believe it was a joke. Hernandez grabbed a kitchen knife and stabbed Kegler in the back. Hernandez told the police that Metzger was still in the hallway and saw the stabbing. When asked about it, Metzger acknowledged that he may have been in the hallway adjusting the thermostat.

Hernandez followed Kegler to the bedroom where Metzger was laying on the bed. After Kegler fell on the bed, Hernandez stabbed her several more times and Metzger got up and walked out.

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[7] The jury was instructed with CALCRIM 401 which stated in pertinent part: "Someone *aids and abets* a crime if he or she knows the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime. [¶] . . . [¶] If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor."

The jury reasonably inferred that Metzger, by granting permission to kill Kegler, aided and abetted Hernandez by such encouragement. He also moved off the bed so that Hernandez had a clear shot at Kegler. " 'Aiding and abetting may be committed "on the spur of the moment," 'that is, as instantaneously as the criminal act itself. [Citation.]' [Citation.]" (*People v. Swanson-Birabent* (2003) 114 Cal.App.4th 733, 742.)

After 44 blows with the knife, Hernandez joined Metzger in the living room and reported that "she's just bleeding in there." Hernandez took a 15 minute break, slashed Kegler's throat, and told Metzger "I did it." Metzger told the police that he was drunk and asleep, and roused after the murder. This statement was at variance with what Hernandez told the police.[8] Thus, the jury could reasonably conclude that Metzger was untruthful. Such a false statement was strong evidence of guilt. (*People v. Campbell, supra,* 25 Cal.App.4th at p. 409.)

Metzger argues that words alone do not establish guilt as an aider and abettor. Words alone, however, may constitute aid if they amount to incitement,

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[8] Hernandez's confession describes the murder timeline:

"SBSO1 [Officer]: . . . You're telling us that Burton [Metzger] was in the room already. Mom went into the room, you followed her and was stabbing her in the room and Burton left. Is there any reason why Burton would be saying that he was in the living room asleep, heard screaming and yelling, thought you guys were fighting and didn't know anything happened until you came out and said, I just killed my mom.

"Derrick: Nah. I mean, nah, he was laying in the bed. And I walked in and started stabbing her and he left. Then as soon as he left, she's laying in the bed, bleeding, I talked to her a little bit, you know? Like the only convers-, conversation of killing that we had that actual day besides the are you really serious about killing your mom? You know, was after I had stabbed her, left her on the bed and I just said, yeah, she's just bleeding in there, and that's it. . . .

"SBSO2 [Officer]: You stabbed her, she's laying on the bed, before you stabbed her in the neck . . . . How long did she lay in the bed before you went back and stabbed her?

"Darrick: Prob'ly at least fifteen – twenty minutes."

instigation, advisement, or encouragement. (See e.g., *People v. Francis* (1969) 71 Cal.2d 66, 72; *People v. Bishop* (1988) 202 Cal.App.3d 273, 282, fn. 6.) " 'In order to hold the accused as an aider and abettor the test is whether the accused in any way, directly or indirectly, aided the perpetrator by acts or encouraged him *by words or gestures.*' [Citation.]" (*People v. Francis, supra,* 71 Cal.2d at p. 72, emphasis added.) Although the "sure, go ahead" remark did not incite the murder, the words spoken, when considered in the context of Metzger's other conduct, was strong evidence of encouragement. On review, we do not reweigh the credibility of the witnesses, parse the evidence, or assume that the jury only considered what was said before Hernandez reached for the knife. (See *People v. Kraft* (2000) 23 Cal.4th 978, 1053 [reviewing court must examine whole record in light most favorable to judgment].)

Metzger's conduct after the murder further supports the finding that Metzger and Hernandez shared a common purpose. (*Ibid.*; *People v. Perryman* (1967) 250 Cal.App.2d 813, 820.) Metzger helped wrap the body in a sheet, carried it outside in a wheelbarrow, and put the body in the car trunk. Metzger drove Hernandez to the Harris Grade and helped throw the body off a hillside. Returning home, Metzger cleaned up blood, burnt sheets, destroyed evidence, and told friends and the police that Kegler had run away. The aiding and abetting conviction is supported by the evidence.

Voluntary Intoxication

Metzger argues that the trial court erred in not instructing that the jury should consider Metzger's intoxication in deciding whether he was liable as an aider and abettor. CALCRIM 625 instructed that "[y]ou *may* consider evidence, if any, of defendants Darrick Omar Hernandez's and Burton Roy Metzger's voluntary intoxication only in a limited way. *You may consider that evidence only in deciding whether the defendant acted . . . with willful deliberation and premeditation.* [¶] . . . [¶] You *may* not consider evidence of voluntary intoxication for any other purpose." (Emphasis added.)

We reject the argument that CALCRIM 625, which uses the permissive "may," denied Metzger a fair trial. The trial court also gave CALCRIM 404 which stated that the jury could consider Metzger's intoxication in determining whether he knew Hernandez intended to murder Kegler and whether he intended to aid and abet Hernandez.[9] Other instructions told the jury that it was to consider all the evidence and that "[i]t is up to you, exclusively, to decided what happened. . . .
[¶] . . . . . [¶] Some of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts." (CALCRIM 200.)

Defense counsel argued that Metzger was in an alcoholic stupor and roused from his sleep after the murder was a fait accompli. The prosecutor did not argue that CALCRIM 625 precluded that jury from considering voluntary intoxication in determining whether Metzger aided and abetted a lesser offense. The jury convicted Metzger of aiding and abetting a second degree murder, discrediting the defense claim that he was drunk and passed out. (See *People v. Whitfield* (1994) 7 Cal.4th 437, 450-451 [voluntary intoxication material to a finding of implied malice for second degree murder].)

Viewing the instructions as a whole and the arguments of counsel, it is not reasonably likely that the jury misunderstood or misapplied the instructions. (*People v. Frye* (1998) 18 Cal.4th 894, 957; see *People v. Mendoza* (1998) 18 Cal.4th 1114, 1134 [voluntary intoxication instruction need not distinguish between aider and abettor knowledge and intent requirements].) "[A] jury can still find an intoxicated person guilty

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[9] The CALCRIM 440 instruction stated: "If you conclude that a defendant Burton Roy Metzger was intoxicated at the time of the alleged crime, you may consider this evidence in deciding whether the defendant: [¶] A. Knew that Derrick Omar Hernandez intended to commit willful, deliberate and premeditated murder; [¶] AND [¶] B. Intended to aid and abet Darrick Omar Hernandez in committing willful, deliberate and premeditated murder. [¶] Someone is *intoxicated* if he or she took or used any drug, drink, or other substance that caused an intoxicating effect."

as an aider and abettor. Evidence of intoxication, while legally relevant, may be factually unconvincing." (*Id*., at pp. 1133-1134.) Here the evidence of guilt was strong and it is not reasonably probable that Metzger would have obtained a more favorable result had the trial court clarified the instructions on voluntary intoxication. (*People v. Breverman*, *supra,* 19 Cal.4th at pp. 177-178.)

Roper v. Simmons

Hernandez argues that Welfare & Institutions Code section 707, subdivision (d), which permitted the prosecution to charge Hernandez as an adult, violates his due process and equal protection rights. The statute is part of Proposition 21, which was approved by California voters on March 7, 2000 and grants the prosecutor the discretion to file certain charges against offenders 14 years of age or older in criminal court without a judicial determination that the minor is unfit for a juvenile court disposition. In *Manduley v. Superior Court* (2002) 27 Cal.4th 537, our Supreme Court concluded that Proposition 21 does not violate a minor's due process or equal protections rights, and does not violate the separation of powers doctrine. (*Id.*, at pp. 550-572.)

Appellant's citation of *Roper v. Simons* (2005) 543 U.S. 551 [161 L.Ed.2d 1] is inapposite. This case holds that Eighth Amendment prohibition against cruel and unusual punishment bars imposition of the death penalty where a juvenile is convicted of murder. The death penalty is subject to unique substantive and procedural restrictions. (*People v. Demirdijan* (2006) 144 Cal.App.4th 10, 14.) *Roper v. Simons, supra*, does not apply to the prosecution of a juvenile for first degree murder where a life sentence is imposed. (*Id*., at p. 16.) Under principles of stare decisis, we are bound to follow *Manduley v. Superior Court, supra,*27 Cal.4th 53, which holds that minimal constitutional standards of procedural fairness do not require a fitness hearing to determine whether Hernandez is amendable to a juvenile court disposition. (*Id*., at p. 562; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Probation Report

Hernandez finally asserts that the matter must be remanded to correct errors in the probation report. The trial court acknowledged the errors and agreed with

counsel's corrections before imposing the sentence mandated by law.[10] "The mere presence of erroneous sentencing information in the record does not require reversal; such information becomes constitutionally significant only if the sentencing court relies upon it. [Citation.]" (*People v. Tang* (1997) 54 Cal.App.4th 669, 678.) It would exalt form over substance to remand this matter to correct minor errors in the probation report. (*Ibid.; People v. Coelho* (2001) 89 Cal.App.4th 861, 889.)

Hernandez's and Metzger's remaining arguments have been considered and merit no further discussion. Both received a fair trial and were convicted on overwhelming evidence.

The judgment is affirmed as to Hernandez. Metzger's conviction for accessory after the fact is vacated because it is subsumed in the conviction for aiding and abetting a second degree murder. (*People v. Nguyen, supra*, 21 Cal.App.4th at pp. 536-537; *People v. Francis* , *supra*, 129 Cal.App.3d at pp. 251-253.) As modified, the judgment against Metzger is affirmed and his sentence remains the same: 15 years to life state prison.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

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[10] Defense counsel argued that the probation report, among other things, incorrectly states that Hernandez's father was Hispanic rather than Puerto Rican, that the stabbing incident lasted 20 to 30 minutes, and that Hernandez and Metzger went to bed after the murder as if nothing had happened.

James E. Herman, Judge

Superior Court County of Santa Barbara

- Wendy C. Lascher; Lascher & Lascher, for Burton Metzer, Defendant and Appellant.

Madeline McDowell, under appointment by the Court of Appeal, for Darrick Omar Hernandez, Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Douglas L. Wilson, Deputy Attorney General, for Plaintiff and Respondent.